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In the Supreme Court of the United States

OCTOBER TERM, 1976

MELVIN JOHNSON, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

MARC PHILIP RICHMAN,
JOHN J. KLEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 539 F. 2d 181.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a-32a) was entered on June 21, 1976. A petition for rehearing with suggestion for rehearing *en banc* was denied on July 30, 1976. The petition for a writ of certiorari was filed on August 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government violated the disclosure order requirements of the federal and District of Columbia electronic surveillance statutes.

2. Whether certain petitioners should have been identified in the wire interception application and order.

3. Whether the failure to serve formal inventory notice of the wire interception on certain petitioners requires suppression of their intercepted calls.

STATUTES INVOLVED

The relevant statutory provisions are set out in the Appendix, *infra*.

STATEMENT

After a non-jury trial on stipulated facts in the United States District Court for the District of Columbia, petitioner Johnson was convicted of conducting an illegal gambling business (numbers), in violation of 18 U.S.C. 1955, and the remaining petitioners were convicted of operating the same business, in violation of 22 D.C. Code 1501 (C.A. App. 180-181).[1] Petitioner Johnson was sentenced to imprisonment for a term of 20 months to five years. Petitioners Madre and Byers were sentenced to terms of imprisonment for one to three years, and petitioners Matthews and Jones to imprisonment for 6 to 18 months (C.A. App. 203). The court of appeals affirmed (Pet. App. 1a-29a).

The stipulated evidence (C.A. App. 153-179) established that petitioners conducted an illegal numbers operation from an apartment at 1900 16th St., N.W., Washington,

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[1]"C.A. App." refers to the appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

The indictment (C.A. App. 205-206) had originally charged all petitioners with violating both the federal and D.C. statutes indicated above, but the local count involving petitioner Johnson and the federal count involving the remaining petitioners were severed and dismissed pursuant to pre-trial plea negotiations leading to the trial on stipulated facts (C.A. App. 151, 180-181).

D.C., using two telephones located therein. The evidence, which consisted primarily of intercepted telephone conversations, showed that the numbers business accepted bets of about $3,000 per day (C.A. App. 159).

On April 30, 1973, Judge Parker of the United States District Court for the District of Columbia authorized the D.C. police narcotics branch to install pen registers on telephones at two addresses, including that of petitioner Madre, for the purpose of investigating federal narcotics violations (C.A. App. 5-7; Pet. App. 4a).[2] Evidence from the pen register was used with other evidence to support an application for a wire interception order for the same telephones. The intercept order was issued on July 27, 1973, pursuant to 18 U.S.C. 2518, and was directed at the discovery of violations of the same federal narcotics statutes (C.A. App. 31-34; Pet. App. 4a-5a). Judge Parker directed the government to file progress reports with him, and they were filed on August 3, 9, and 21, 1973 (C.A. App. 188-198; Pet. App. 5a). The July 27 wire interception produced substantial evidence relating to the narcotics violations, but even more calls were overheard regarding illegal bookmaking, many of the calls involving telephones at 1900 16th Street. The progress reports advised Judge Parker that a large number of illegal gambling calls were being overheard, and the reports were endorsed by the judge (C.A. App. 188, 192, 195; Pet. App. 5a).

The evidence regarding the gambling calls made to the 16th Street address was given by the D.C. narcotics branch to the police gambling unit, which on August 18, 1973, obtained from Judge Parker an order allowing

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[2]D.C. police are empowered to investigate and enforce federal statutes that have effect in the District of Columbia. See 4 D.C. Code 119.

installation of pen registers on two telephones at that address. The pen register order indicated that there was probable cause to believe that both federal and D.C. gambling statutes were being violated (C.A. App. 60-62; Pet. App. 5a). However, the pen registers disclosed only local bookmaking violations, and accordingly these results were used with other evidence to support an application to Chief Judge Greene of the D.C. Superior Court[3] for a wire interception order to allow investigation of the D.C. violation.[4] Chief Judge Greene authorized the intercept on September 28, 1973, for a maximum of 15 days (C.A. App. 103-106; Pet. App. 6a-7a).[5] The incriminating evidence petitioners seek to suppress was derived from this interception.

ARGUMENT

1. When Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520) permitting electronic surveillance, it authorized use of this tool for the investigation of only certain

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[3]Since this appeared at the time to be a local, not a federal case, the wire interception authorization was obtained from a local District of Columbia judge (Pet. App. 6a, n. 15).

[4]The application was supported by a 35-page affidavit setting forth in detail the reasons for believing that the two telephones at 1900 16th Street were being used as part of a gambling enterprise conducted in violation of 22 D.C. Code 1501. The factual evidence relied upon included police surveillance reports, statements of anonymous informants, and detailed information obtained through the previously authorized pen registers (C.A. App. 68-102; Pet. App. 6a).

[5]In his intercept order, Judge Greene found that there was probable cause to believe that the telephones were being used by certain individuals to violate the D.C. gambling and conspiracy statutes, that evidence of those offenses would be obtained through the interception, and that the wire interception was necessary (C.A. App. 103-106; Pet. App. 7a).

serious offenses (18 U.S.C. 2516(1)) and required each court authorization to specify the particular offenses being investigated (18 U.S.C. 2518(4)(c)). Realizing that during the course of an interception for conversations relating to one offense conversations relating to other offenses might be overheard, Congress authorized the monitoring agents to intercept such "other crimes evidence." 18 U.S.C. 2517(5). However, the use and disclosure of other crimes evidence was carefully regulated, to insure that an interception authorized to investigate specified offenses had not been a subterfuge to investigate other offenses, and that the evidence of other crimes was come upon incidentally during the course of executing a lawful order. S. Rep. No. 1097, 90th Cong., 2d Sess. 100 (1968). Thus, evidence of other crimes may be disclosed to and used by investigating officers in the performance of their official duties without limitation, but it may be disclosed at trial only if authorized by a judge after a finding that it was intercepted in accordance with Title III (the "disclosure order"). 18 U.S.C. 2517(5).[6]

Petitioners assert (Pet. 11-12) that the government should have sought a disclosure order before using the evidence relating to gambling discovered in the course of the July 27 narcotics interception. They contend that a disclosure order was required before that evidence could be used to obtain subsequent intercept orders to investigate gambling offenses, or at least before the fruits of the July 27 interception (*i.e.*, the evidence derived

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[6]As originally enacted, Section 2517 treated disclosure of other crimes evidence to the grand jury in the same way as disclosure at trial (82 Stat. 217-218). When the Section was amended in 1970, Congress eliminated the reference to the grand jury (84 Stat. 947). Accordingly, we believe that the disclosure order requirement now applies only to evidence introduced in trials or trial-like proceedings. But see *United States* v. *Marion*, 535 F. 2d 697 (C.A. 2); *United States* v. *Brodson*, 528 F. 2d 214 (C.A. 7).

from the subsequent gambling intercepts) could be introduced at trial.

As the court of appeals noted (Pet. App. 16a-18a), petitioners have waived this objection by their failure to raise it before trial as required by both the D.C. and federal wire interception statutes, since they were aware of the grounds for the objection and had ample opportunity to make it prior to trial. 18 U.S.C. 2518(10)(a); 23 D.C. Code 551(b). See *United States* v. *John*, 508 F. 2d 1134, 1140 (C.A. 8), certiorari denied, 421 U.S. 962; *United States* v. *Sisca*, 503 F. 2d 1337, 1349 (C.A. 2), certiorari denied, 419 U.S. 1008.[7] The reasons advanced by petitioners to excuse this neglect (Pet. 20-21) plainly do not suffice to overcome the statutory requirement of timely objection; even if judicial power existed to excuse compliance with the statutory mandate, which it does not, there would be no occasion to do so in a case such as this where the claim has no bearing upon the petitioners' guilt or innocence.

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[7]Moreover, four of the petitioners have failed to establish standing to complain about the utilization of information derived from a previous wire interception. Since there is nothing in the record to indicate that any petitioner other than petitioner Madre was overheard during the prior interception, only she has demonstrated standing to challenge the use of information obtained during that interception. The other petitioners may not assert her rights as a basis for suppression of evidence obtained without violation of their own rights. "[S]tanding to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search." *United States* v. *Calandra*, 414 U.S. 338, 348; see *Brown* v. *United States*, 411 U.S. 223, 229-230. The traditional standing rules were incorporated into the suppression sections of Title III. See S. Rep. No. 1097, *supra*, at 91, 106; *Alderman* v. *United States*, 394 U.S. 165, 171-172, 175-176 n. 9; *United States* v. *Scasino*, 513 F. 2d 47 (C.A. 5); *United States* v. *Gibson*, 500 F. 2d 854 (C.A. 4), certiorari denied, 419 U.S. 1106.

Accordingly, while we believe that petitioners' contentions in this regard are wholly without merit and were properly rejected by the court of appeals (Pet. App. 9a-15a), there is no occasion to address them here, as petitioners are entitled to no relief irrespective of the merits of their contentions on the Section 2517 issues.

2. Petitioners Byers, Johnson, and Jones contend (Pet. 21-24)[8] that conversations intercepted during the September 28 wire surveillance should have been suppressed for violation of 23 D.C. Code 547(a)(2)(D) and (e)(1) because the wire surveillance application and order identified only Madre, although the government allegedly had probable cause to believe that Byers, Johnson, and Jones would also be overheard discussing illegal gambling activities over the target telephones.[9] However, the courts below have rejected the premise of petitioners' claim. Three courts have held that the government did not have probable cause to believe that these petitioners would be overheard participating in incriminating conversations: the issuing judge, the trial judge below, and the court of appeals panel (Hearing Tr. 76-78; Pet. App. 19a-22a).[10] There is no need for this Court to review this

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[8]Petitioner Madre was identified in the application and order, and petitioner Matthews has not claimed he should have been identified (Pet. App. 18a, n. 32).

[9]The D.C. intercept statute applies here because the September 28 intercept order was issued pursuant thereto. Its relevant provisions do not differ in any significant respect from the similar provisions in the federal statute.

[10]Although the court of appeals couched its finding in terms of whether the petitioners should have been named by the issuing judge in the intercept order, because it held that they had in effect been identified in the application (Pet. App. 19a), the test is the same for inclusion in the application (*United States* v. *Kahn*, 415 U.S. 143, 152), and therefore the court of appeals implicitly affirmed the finding of the district court.

essentially factual determination. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

Petitioners correctly point out (Pet. 22-23) that several courts have concluded under the federal statute (see note 9, *supra*) that the government has a duty to identify all those it has probable cause to believe it will overhear engaging in illicit conversations over the intercepted telephones, and have suppressed the results of interceptions when they found a violation of that duty. Indeed, the District of Columbia Circuit is one of those so holding (*United States* v. *Moore*, 513 F. 2d 485, 493-494). But no court has held there is any duty to name persons the government has no probable cause to believe it will overhear,[11] and there is no indication that any court of appeals would have sustained petitioners' contention that such probable cause existed as to them. Thus, the conflict in the circuits on the scope of the naming requirement in 18 U.S.C. 2518(1)(b)(iv) is not implicated in this case. There is, accordingly, no need to delay consideration of this petition pending decision in *United States* v. *Donovan*, No. 75-212, argued October 13, 1976, the outcome of which will not affect the proper disposition of the instant issue.

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[11]This Court rejected a similar claim in *United States* v. *Kahn*, *supra*. Petitioners suggest that the court of appeals was being hypertechnical in requiring probable cause to believe not only that petitioner Byers was involved in the illegal activity but also that he would be overheard during the course of the intercept, and that the latter requirement is without precedent. This is incorrect; the naming requirement clearly applies only to those "whose communications are to be intercepted." 18 U.S.C. 2518(1)(b)(iv). At least two courts have explicitly so held. *United States* v. *Russo*, 527 F. 2d 1051, 1056 (C.A. 10), certiorari denied, June 1, 1976 (No. 75-1218); *United States* v. *Chiarizio*, 525 F. 2d 289, 291-293 (C.A. 2).

3. Petitioners Byers, Jones, and Matthews contend (Pet. 25-26) that the evidence should have been suppressed because the government failed to serve them with formal inventory notice of the interception when timely notice was served upon 26 other persons who had been overheard (C.A. App. 140-142).[12] However, within a week after termination of the interception, petitioners' attorney was given copies of the intercept affidavit and order, as well as a pertinent search warrant affidavit. These documents provided all the information required by the inventory notice provision, 23 D.C. Code 550, and provided it long before the 90-day time period for inventory notice expired (Pet. App. 26a).[13] Petitioners' complaint is thus simply that they were not served with a specific document identified as an inventory notice, not that they did not receive, within the time limits specified in the statute, all the information they would have received had they been so served.

The question whether the failure to serve an inventory notice on persons not identified in a federal intercept order warrants suppression in the absence of any showing of prejudice is before this Court in *Donovan*, *supra*. But even if the Court should decide that issue in *Donovan* adversely to the government, suppression would not be warranted on the particular facts of this case under the D.C. statute. Here, the record shows beyond dispute that the government provided these defendants with more than the information they would

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[12]Jones was not served with an inventory notice because the police had received incorrect information as to his address; Byers and Matthews were not served because of oversight (Pet. App. 24a-25a).

[13]The D.C. statute also applies to this issue because petitioners claim they did not receive notice of the September 28 interception, which was conducted under that statute.

have received from the inventory notice and did so before the time for service of that notice expired. In these circumstances there plainly was substantial compliance under any conceivable interpretation of the relevant inventory requirements. Accordingly, we submit that there is no reason to hold this case pending the decision in *Donovan* on this issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of ceritorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

MARC PHILIP RICHMAN,
JOHN J. KLEIN,
Attorneys.

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APPENDIX

18 U.S.C. 2517 provides in pertinent part:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
>
> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.
>
> * * * * *
>
> (5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof,

and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be use under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

18 U.S.C. 2518 provides in pertinent part:

(10)(a) Any aggrieved person * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. * * *

23 D.C. Code 547 provides in pertinent part:

(a) Each application for an order authorizing or approving the interception of a wire or oral communication * * * shall include—

* * * * *

(2) a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including; * * * (D) the identity of the person, if known, who committed, is committing, or is about to commit the offense and whose communications are to be or were intercepted;

23 D.C. Code 550 provides in pertinent part:

(a) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 23-548 which is denied, or the termination of the period of any order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine, in his discretion, are necessary in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application for an order of approval which was denied;

(2) the date of the entry of the order or the denial of the application for an order of approval;

(3) the period of authorized, approved, or disapproved interception; and

(4) whether during the period wire or oral communications were intercepted.

23 D.C. Code 551 provides in pertinent part:

(a) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence * * * unless not less than ten days before the trial * * * —

(1) the inventory as provided in section 23-550 has been served; * * *

* * * * *

(b) Any aggrieved person * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(1) the communication was unlawfully intercepted;

(2) the order of authorization or approval under which it was intercepted is insufficient on its face;

(3) the interception was not made in conformity with the order of authorization or approval;

(4) service was not made as provided in section 23-547; or

(5) the seal prescribed by section 23-549(a) is not present and there is no satisfactory explanation for its absence.

The motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion. * * *